

VERMONT LABOR RELATIONS BOARD

VERMONT STATE HOSPITAL)
PERSONNEL DESIGNATION DISPUTES)

DOCKET NO. 81-63

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

Between the period August 18, 1981 - October 8, 1981, the Vermont Labor Relations Board received 11 Notices of Dispute from employees of the Vermont State Hospital ("Hospital"), disputing their designations as managerial, confidential, or non-management employees pursuant to 3 VSA §906 by the Commissioner of Personnel. On October 9, 1981, the Vermont State Employees' Association ("VSEA") filed a petition with the Board alleging two positions at the Hospital designated as confidential should be designated as supervisory.*

A hearing was held before the full Board at the Board hearing room in Montpelier on December 17, 1981. Prior to the hearing or at the hearing, all but three of the disputes were either resolved or withdrawn.

*In 1981, the Department of Personnel went through every position in the classified service and designated the position as either managerial, confidential, supervisory, or, by implication, non-management pursuant to 3 VSA §906. Designations were completed by early August. There being no Board rule on the timeframe within which designation disputes pursuant to 3 VSA §906 must be filed with the Board, and all employees not being personally notified of the designations of their position, VSEA and the State agreed, and the Board ordered, the deadline for disputing designations was October 9, 1981, and the State would insert in each classified employee's paycheck a notice of the employee's right to dispute the designation of their position along with a form which the employee could return to the Clerk of the Board to register his/her dispute. Such insertion was made on September 24, 1981.

Of the three remaining disputes, VSEA contested two of the designations, and Sharon Wilson, appearing pro se, contested the designation of her position. VSEA was represented by their counsel, Michael R. Zimmerman. Scott Cameron, Assistant Attorney General, represented the State. Findings of Fact and Memoranda of Law were filed by VSEA and the State on January 15, 1982, and January 21, 1982, respectively.

FINDINGS OF FACT

Director of Quality Assurance

1. In July, 1981, the Commissioner of Personnel designated the Director of Quality Assurance position at the Hospital as "confidential". VSEA disputes that designation and contends the position should be designated as "supervisory".

2. William Deane is, and has been since October 6, 1980, employed by the Hospital as Director of Quality Assurance (Pay Scale 18). Dr. Deane is the only Director of Quality Assurance at the Hospital.

3. Dr. Deane's function is primarily to make certain that the quality of patient care at the Hospital meets standards for such care promulgated by regulatory bodies. The regulatory standards which must be met are those issued by (1) the American Medical Association's Joint Commission on Accreditation of Hospitals ("JCAH"), and (2) the Federal government (eg. Medicare and Medicaid standards). The consequences of losing accreditation would be the loss of Federal and, perhaps, State money.

4. Dr. Deane supervises a small staff of Quality Assurance Monitors (i.e. four), and he reports directly to the Superintendent of the Hospital, Dr. George Brooks.

5. Dr. Brooks uses Deane as a watchdog to ensure programs are being successfully carried out. As such, Deane maintains extensive contact with program/section heads and chairs or is a member of a number of internal Hospital committees to assist in identifying problem areas and strategies for correction and/or improved services. Deane chairs the Quality of Patient Care Committee, which reviews the treatment of long-term patients and considers policy matters having to do with accreditation. Deane also chairs the Utilization Review Committee, which is required by Medicare and Medicaid to ensure the Hospital is being used as it should be.

6. The Governing Body is an advisory group to the Superintendent and the Department of Mental Health. Its purpose is to assist the Superintendent with large or vexatious problems concerning Hospital policy. Deane serves on the Governing Body which is chaired by Dr. Brooks. The other members of this body are the Deputy Commissioner of the Mental Health Department, the President of Professional Staff, the Nursing Service Administrator, the Hospital Administrator, and the Director of Clinical Support Services.

7. Among the policy decisions which the Governing Body considers are budgetary and personnel administration problems affecting the Hospital. Discussion on these matters would be inhibited if union representatives sat in on these meetings.

8. The ultimate decision-maker concerning all matters of administration at the Hospital is Dr. Brooks. Included among Dr. Deane's duties are collecting data and presenting it to Dr. Brooks for his use in making

those decisions. Deane could, although it has yet to happen, be required to collect data and/or submit recommendations to Dr. Brooks concerning staffing patterns and shift changes at the Hospital.

9. Currently, Deane is doing a report on the productivity of Hospital staffing units. The report involves comparing each unit in terms of the discharge rate each has. This is important in formulating the future direction of the Hospital given a likely future of fewer patients and fewer staff.

Stenographer C

10. In July, 1981, the Commissioner of Personnel designated a Stenographer C position at the Hospital, classified position No. MH-338, as "confidential". VSEA disputes that designation and claims the position properly belongs in the Non-Management bargaining unit.

11. Princess Barany is, and has been since about February, 1981, the occupant of the Stenographer C position. She is secretary to the Hospital Superintendent, Dr. Brooks.

12. From the time she began working in the position until about October, 1981, Barany was secretary for the Superintendent 50 percent of the time, and for the Director of Clinical Support Services, Lynn Taylor, the other 50 percent of the time. Taylor left the position of Director of Clinical Support Services in October, 1981, and, that position still being vacant, Barany has since then worked exclusively for the Superintendent, who writes her performance evaluation.

13. The Hospital Superintendent is directly responsible for every aspect of the management of the Vermont State Hospital. Dr. Brooks has the ultimate authority with respect to matters of personnel administration

at the Hospital, including the final disposition of all serious disciplinary and performance problems. His job duties necessarily include responsibility for final decision-making concerning the Hospital's budget. Dr. Brooks' position entails his involvement in aspects of collective bargaining which affect personnel at the Hospital, including negotiations over shift changes.

14. Barary's duties involve taking dictation from the Superintendent, answering the telephone in the Superintendent's office, typing the Superintendent's correspondence, filing, scheduling appointments for the Superintendent, and taking Minutes of meetings.

15. Barary has a private office adjacent to the Superintendent's office with a door which can be closed to assure her privacy.

16. Barary has access to all the files maintained by Superintendent Brooks including matters relating to personnel administration, collective bargaining, and budgetary matters.

17. Barary has typed memos from Dr. Brooks concerning budgetary matters. She has never typed a dismissal letter, a letter of suspension, or a letter of reprimand. On one occasion, the Superintendent was the hearing officer in a grievance, and Barary typed the decision rendered by him.

Coordinator of Volunteer Services

18. In July, 1981, the Commissioner of Personnel designated the Coordinator of Volunteer Services position at the Hospital as Non-Management. The present occupant of the position, Sharon Wilson, occupant of the position since December, 1977, contests that designation and claims she should have been designated a "supervisory" employee and placed in the supervisory bargaining unit.

19. Members of the supervisory unit are entitled to additional benefits not available to the non-management unit.

20. The Coordinator of Volunteer Services is responsible for recruiting, hiring, training and supervising all volunteers at the Hospital. Volunteers assist Hospital staff in administering to the needs of patients. They are not employees of the Hospital, and are not paid for their efforts. There are 25-30 volunteers that generally work in all areas of the Hospital, and many of them work in the Hospital Community Library.

21. Part of Wilson's job function involves the exercise of some supervisory functions over two paid employees at the Hospital:

- a) Stenographer B
- b) Hospital Community Librarian

22. Wilson shares the services of the Stenographer B with another person at the Hospital, and both participate in writing the performance evaluation of the employee. Generally, Wilson has the services of the Stenographer B available to her 50 percent of the time.

23. Wilson's daily supervisory authority over the Librarian is largely administrative (i.e. noting when she's tardy, scheduling lunch breaks). The Vermont Department of Librarians oversees the quality of the Librarian's work and is available as a professional resource.

24. Wilson did not hire the employees under her supervision, but if they left their jobs, she would hire their replacements.

25. Wilson has never disciplined the two employees under her supervision, but she has authority to discipline them without consulting with her supervisor, Hospital Administrator Len White.

26. The parties stipulated, and we find any classified employees designated "managerial" or "confidential" as a result of the designation of the Commissioner of Personnel who were previously included within a bargaining unit represented by VSEA will not lose any collective bargaining rights, including the right to be represented by VSEA or be a member of VSEA, until the expiration of the current Agreement between VSEA and the State. This stipulation does not waive the right of employees so designated to claim collective bargaining rights after the expiration of the Agreement.

OPINION

At issue here are disputes over designations of three positions at Vermont State Hospital by the Commissioner of Personnel. Two of the positions were designated as "confidential", the other "Non-Management". 3 VSA §906 provides that any such disputes "shall be finally resolved" by this Board. Each position in dispute will be discussed in turn.

Director of Quality Assurance

The Commissioner designated the Director of Quality Assurance position at the Hospital as "confidential". VSEA disputes that designation, claiming the position should have been designated "supervisory". 3 VSA §902(5)K excludes confidential employees from the definition of a State employee eligible to be a member of a collective bargaining unit. "Confidential Employee" is defined in 3 VSA §902(17) as:

An employee finally determined by the Board as having responsibility or knowledge or access to information relating to collective bargaining, personnel administration or budgetary matters that would make membership in or representation by an employee organization incompatible with his official duties.

This is the first case involving State employees where we have had occasion to determine whether an employee was confidential. However, we have made many such determinations under the Municipal Employee Relations Act¹ and the language of the Municipal Act [21 VSA §1722(6)] and the State Employees' Act are virtually identical.

¹Local 1343 AFSCME and Town of Colchester, 1 VLRB 1 (1977). Vermont State Employees' Association, Local 1343, AFSCME and City of St. Albans, 1 VLRB 9 (1977). AFSCME Local 490 v. Town of Bennington, 1 VLRB 239 (1978); American Federation of Teachers, Local 3333 and Washington Central Supervisory Union, 1 VLRB 288 (1978). Castleton Education Association and Castleton Board of School Directors, 1 VLRB 374 (1978). Vermont Education Association and Rutland City School Department, 2 VLRB 108 (1979). Vermont Education Association and Windsor Town School District, 2 VLRB 295 (1979). United Steelworkers of America, Local 8774, Barre and City of Barre, 5 VLRB 3 (1982).

The rationale for excluding confidential employees from membership in a bargaining unit has been stated by this Board in American Federation of Teachers, 1 VLRB 288, at 293 (1978):

Vermont's municipal labor relations statute...adheres to the rationale generally accepted in labor law that an employer should be entitled to rely upon employees who are not subject to divided loyalties and that employees should not be put in a position where they must choose between their obligations to a union and to their employer.

The same rationale applies to the State employees' statute. Two facets of Doctor Deane's job duties make his inclusion in the bargaining unit incompatible with his job. First, Deane's membership on the Governing Body means he has access to, and knowledge of, budgetary matters and personnel administration problems affecting the Hospital which are not available to VSEA representatives. Deane testified that if the Executive Director of VSEA sat in on Governing Body meetings, discussions would be inhibited. This indicates the confidential nature of these meetings and the potential of divided loyalties for a VSEA member who sits in on these meetings. Second, included among Deane's duties are collecting data and/or making recommendations, then presenting it to Dr. Brooks for his use in making decisions.

An additional consideration is that Deane could very well, although it has yet to happen, be called upon to make recommendations concerning staffing patterns and shift changes at the Hospital which could ultimately radically impact on bargaining unit members. Deane currently is doing a report comparing each Hospital unit in terms of their productivity. Given a probable future of fewer patients and fewer staff, the results of such a report could greatly influence future staffing patterns and shift changes at the Hospital. These are matters of personnel administration which

the VSEA would be intimately involved in in terms of negotiating the impact of shift changes pursuant to Article 18, Employee Workweek, of the collective bargaining agreement in effect between the State and VSEA. It is evident Deane's research and recommendations would be of vital importance to Superintendent Brooks, and it is imperative the Superintendent be allowed to rely on Deane without Deane being in a position where he must choose between his obligations to VSEA and his employer.

In sum, we believe Deane has responsibility for, knowledge of, and access to information relative to collective bargaining, personnel administration, and budgetary matters that make representation by VSEA incompatible with his official duties.

Stenographer C

The Hospital Superintendent's first-line secretary, a Stenographer C position, was also designated "confidential" by the Commissioner. VSEA claims the position should have been designated Non-Management. We have consistently held first-line secretaries to chief administrators are properly excluded from the bargaining unit as confidential employees, Local 1343 AFSCME and Town of Colchester, 1 VLRB 1 (1977); American Federation of Teachers, *supra*; Vermont Education Association and Rutland City School Department, 2 VLRB 103 (1979); and there is no reason to decide otherwise here.

The occupant of the position, Princess Barany, has access to all the files maintained by the Hospital Superintendent, Dr. Brooks, including matters relating to personnel administration, collective bargaining, and budgetary matters. Further, she has typed memos from Dr. Brooks concerning budgetary matters and a grievance decision he made

as a hearing officer. Also, while she has yet to type a disciplinary letter from Brooks to an employee, that is simply because there have been no such letters in the relatively short period she has served as his personal secretary. It is evident that if the occasion arises to draft disciplinary letters, she will do the typing of them.

Coordinator of Volunteer Services

The Coordinator of Volunteer Services position at the Hospital was designated Non-Management by the Commissioner of Personnel. The occupant of the position, Sharon Wilson, contends the position is "supervisory" and that she should be placed in the supervisory unit. "Supervisory employee" is defined in 3 VSA §902(16) as:

An individual finally determined by the board as having authority in the interest of the employer to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employees or responsibility to direct them or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment.

This language is virtually identical to the definition of supervisor under the Vermont Municipal Employee Relations Act. 21 VSA §1722 (12) (B), 21 VSA §1502(13). Under that law, we have made many determinations on the supervisory status of employees.²

²Local 1343, AFSCME and Town of Colchester, 1 VLRB 1 and 235 (1977, 1978). Vermont State Employees' Association, Local 1343, AFSCME, and City of St. Albans, 1 VLRB 9 (1977). AFSCME Local 490 v. Town of Bennington, 1 VLRB 239 (1978). Firefighters of Brattleboro, Local 2628 and Brattleboro Fire Department Town of Brattleboro, 1 VLRB 248 (1978). Affirmed by Supreme Court. 138 Vt. 347 (1980). National Association of Government Employees, National Association of Firefighters and City of Burlington, 1 VLRB 464 (1978). Vermont Education Association and Windsor Town School District, 2 VLRB 295 (1978). Springfield Firefighters Association, Local 2750, International Association of Firefighters and Town of Springfield, 3 VLRB 237 (1980). International Brotherhood of Electrical Workers, Local 300 v. Village of Enosburg Falls, 4 VLRB 370 (1981).

In order to be considered a supervisor, an employee must pass two tests: 1) the possession of any one of the listed powers in the statutory definition; and 2) the exercise of such powers "not of a merely routine or clerical nature but requiring the use of independent judgment". Firefighters of Brattleboro, Local 2628 v Brattleboro Fire Department, Town of Brattleboro, 138 Vt. 347 (1980).

Sharon Wilson, as Coordinator of Volunteer Services, passes both tests. Her undisputed testimony indicates she has the effective authority to hire, suspend, discharge, and otherwise discipline the two employees under her and adjust their grievances. While she has never had occasion to hire employees, discipline them, or adjust their grievances, we find her testimony creditable given the unique nature of her job. She is responsible for the effective operation of a program that uses the services of a large number of volunteers. The work of the Stenographer B and Librarian are integral to the smooth running of the volunteer program. The Stenographer B performs the secretarial work required, and the Librarian is an available resource for the volunteers, many of whom are assigned to the Library. If the Stenographer B and Librarian were Wilson's sole responsibility, we would be reluctant to find Wilson met the statutory definition. However, because Wilson has to direct the work of the volunteers, and the work of the Stenographer B and Librarian are indispensable to her, it is imperative there be employees in those positions answerable to Wilson; whom she can direct and discipline. Also, those employees must be able to relate well to volunteers, so it is plausible to us Wilson has the authority to decide whom to hire for those positions and whom to retain or fire. Accordingly, we find Wilson

does possess the power to hire, discipline, and adjust the grievances of the Stenographer B and the Librarian, and assign and direct their activities. Further, the authority to take such actions is not of a routine or clerical nature, but requires the use of independent judgment in ensuring coordination between the work of the employees under her and the activities of the volunteers. Accordingly, we find Sharon Wilson meets the statutory definition of a supervisory employee.

ORDER

Now, therefore, based on the foregoing findings of fact and for all the foregoing reasons, it is hereby ORDERED:

1) the designations of the Commissioner of Personnel at the Vermont State Hospital making William Deane, Director of Quality Assurance, and Princess Barany, Stenographer C, confidential employees and, thus, ineligible to belong to a bargaining unit are AFFIRMED; and

2) the designation of the Commissioner of Personnel making Sharon Wilson, Coordinator of Volunteer Services at Vermont State Hospital a member of the Non-Management Unit is DENIED. She is a supervisory employee and shall become a member of the supervisory unit; and

3) in accordance with the stipulation of the parties, any classified employees finally designated as "managerial" or "confidential" pursuant to 3 VSA §906 who were included within a bargaining unit represented by the Vermont State Employees Association shall not lose any collective bargaining rights, including the right to be represented by VSEA or be a member of VSEA, until the expiration of the current Agreement between the State and VSEA.

Dated this 5th day of February, 1982, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney
Kimberly B. Cheney, Chairman

William G. Kemsley, Sr.
William G. Kemsley, Sr.

James S. Gilson
James S. Gilson

Appeal to Sup. Ct.
Admitted by Ship
June 1982